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No. 98-3167

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

ELLEN AUDET AS NATURAL MOTHER, GUARDIAN AND NEXT BEST FRIEND OF ASHLEY AUDET, A MINOR,

Petitioner,

vs.

PRUDENTIAL HEALTH CARE PLAN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the decision of the United States Court of Appeals for the Eleventh Circuit that punitive damages are not available under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.*, create a conflict with decisions of other federal circuit courts or state courts of last resort sufficient to call for an exercise of this Court's supervisory power?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

A. The Proceedings Below 1

B. Statement of the Facts 3

1. The Custodial Care Issue 3

2. The Punitive Damages Issue 4

Reasons for Denying the Writ 5

I. The Court has held that punitive damages are not available under ERISA 5

II. There is no conflict among the federal circuit courts or with any valid decision of the highest court of a state 8

III. Neither *Mertens* nor the decisions of the federal circuit courts conflict with Congressional intent .. 11

IV. Ms. Audet's remaining arguments are for Congress and not this Court 12

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES

Blue Cross and Blue Shield of Alabama v. Lewis, 753 F. Supp. 345 (N.D. Ala. 1990) 9

Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992) 11

Ex parte Metropolitan Life Ins. Co., 679 So. 2d 686 (Ala. 1996) 9

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 6

Harsch v. Eisenberg, 956 F.2d 651 (7th Cir.), *cert. denied*, 506 U.S. 818 (1992) 11, 13

Haywood v. Russell Corp., 584 So. 2d 1291 (Ala. 1991) 9, 11

Hemelt v. U.S., 122 F.3d 204 (4th Cir. 1997) 11

Herdrich v. Pegram, 154 F.3d 362 (7th Cir. 1997) 13

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 3, 8, 9, 10, 11

Landwehr v. DuPree, 72 F.3d 726 (9th Cir. 1995) 11

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 13

McRae v. Seafarers' Welfare Plan, 920 F.2d 819 (11th Cir. 1991) 12

Medina v. Anthem Life Ins. Co., 983 F.2d 29 (5th Cir.), *cert. denied*, 510 U.S. 816 (1993) 11

Mertens v. Hewitt Associates, 508 U.S. 248 (1993) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

Turner v. Fallon Community Health Plan, Inc., 127 F.3d 196 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1512 (1998) 11

U.S. v. Burke, 504 U.S. 229 (1992) 5

U.S. v. Carver, 260 U.S. 482 (1923)..... 9

Weems v. Jefferson-Pilot Life Ins. Co., Inc., 663 So. 2d 905 (Ala. 1995) 8, 9, 10

Zimmerman v. Sloss Equipment, Inc., 72 F.3d 822 (10th Cir. 1995)..... 11

STATUTES

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq*..... 1

29 U.S.C. § 1132..... *passim*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) 5

OTHER AUTHORITIES

H.R. Rep. No. 101-247 (1989) 11

Supreme Court Rule 10(a) 10

BRIEF IN OPPOSITION

Respondent Prudential Health Care Plan, Inc. ("Prudential") believes that the Court has already decided the question presented in the Petition and that there is neither confusion nor conflict among the federal circuit courts. The few contrary pronouncements of Alabama state and federal courts are not reliable authority. Therefore, Prudential respectfully requests denial of the Petition.

STATEMENT OF THE CASE

A. The Proceedings Below:

Petitioner Ellen Audet as Natural Mother, Guardian and Next Best Friend of Ashley Audet, a Minor ("Ms. Audet"), filed a breach of contract action against Prudential in state court, alleging that Prudential failed to pay insurance benefits under her employer-sponsored health care plan ("Plan") for professional chest physiotherapy for her daughter Ashley, who suffers from cystic fibrosis. Prudential removed the action to federal court on the basis of ERISA[1] preemption and defended on the basis that the questioned bills were for custodial care excluded by the Plan.

Ms. Audet filed her Second Amended Complaint, alleging a wrongful denial of benefits under 29 U.S.C.

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[1] Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.*

§ 1132(a)(1)(B)[2] from May 30, 1995 to September 15, 1995. Prudential offered to pay the claimed amount, which the parties stipulated was $2,415, but Ms. Audet rejected the offer. Instead, she twice moved to amend her pleadings to seek punitive damages and jury trial, claiming that Prudential had altered records to support its denial of coverage. Prudential opposed the motions both because they were untimely and because punitive damages are not available under ERISA. The United States District Court for the Southern District of Florida denied both motions.

Following non-jury trial, the district court entered its Findings of Fact and Conclusions of Law ("Findings"), which explain that Prudential's denial of benefits was based upon its decision that only custodial care, or care by a lay person with minimal training, was necessary when Ashley's fibrotic condition was not aggravated, and that such custodial care was excluded by the Plan. Pet. App. 9a. In ruling against Prudential on the issue, the court found that Ms. Audet's claim for professional services was reasonable and medically required by Ashley's condition. Pet. App. 10a. While the court held that Ms. Audet was entitled to the amount she claimed, it assigned no bad motive to Prudential's decision and declined to find any significance in a modified recommendation regarding Ashley's need for daily professional physiotherapy. Pet. App. 12a-15a.

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[2] "A civil action may be brought . . . by a participant . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . . "

Relying upon *Ingersoll-Rand*,[3] Ms. Audet appealed the punitive damage and jury decisions to the Eleventh Circuit, again arguing that Prudential's "falsifying medical records to justify denying care to Ashley" entitled her to claim punitive damages and go to a jury. Pet. App. 1a-3a. Prudential again responded that the alleged "falsification" was merely a revision from a first memorandum, recommending that Ashley have physiotherapy five days a week by a professional therapist, to a second memorandum, recommending as-needed professional physiotherapy. Prudential pointed out that the district court, as the factfinder, characterized the difference as a modification to which it refused to assign any bad motive.

The Eleventh Circuit affirmed the decision of the district court, explaining that it "already considered and rejected the argument that *Ingersoll-Rand* opened the door to punitive damages in ERISA cases." Pet. App. 2a.

Ms. Audet now seeks this Court's review, again arguing the Court has held that punitive damages are available under ERISA.

B. Statement of the Facts:

1. The Custodial Care Issue

This case concerned less than $3,000 in insurance coverage for *custodial*, not emergency, care. Prudential covered the cost of Ashley's chest physiotherapy whenever her condition exacerbated, and Ashley's mother, a

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[3] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

trained nurse, was providing chest physiotherapy on a daily basis when the cystic fibrosis was quiescent. No lives were at stake. There is no evidence that Ashley was ever denied treatment or that her health was ever imperiled.

While the district court found that no case manager was assigned to Ashley's case, Ms. Audet never argued that her claims suffered from lack of management. As the district court found, the parties simply differed on whether daily professional chest physiotherapy constituted custodial care excluded from coverage under the Plan. Pet. App. 10a-12a.

2. The Punitive Damages Issue

Ms. Audet's attempt to claim punitive damages is based upon two reports appended to the Findings as Attachment #1 and Attachment #2, both authored by the home health care service retained by Prudential to examine Ashley and report on her therapeutic needs. Pet. App. 12a-15a. The difference in the two Attachments is that the first recommends once-a-day professional chest physiotherapy and the second recommends professional chest physiotherapy on an as-needed basis.

After reviewing the testimony and evidence regarding the reports, their preparation, and the reasons for the difference, the district court declined to conclude that the evidence showed either falsification or alteration, as Ms. Audet urged. Instead, the court simply found a modification from the first report to the second.

REASONS FOR DENYING THE WRIT

I. The Court has held that punitive damages are not available under ERISA.

Ms. Audet's argument ignores the Court's decision in *Mertens*.[4] The *Mertens* petitioners, representing a class of former employees who participated in a retirement plan, sued the plan's actuary for breach of fiduciary duty and sought an award of compensatory damages as "appropriate equitable relief" under § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B).[5] The district court dismissed the action; the circuit court affirmed; and the case came to this Court to answer the question whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in the breach of a fiduciary duty imposed by ERISA.[6]

Writing for the majority, Justice Scalia noted that the Court had not yet interpreted the phrase "appropriate equitable relief"found in § 502(a)(3)(B) but had construed similar language contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), to preclude "awards for compensatory or punitive damages."[7] The Court showed no uncertainty in determining that the same meaning applied to 29 U.S.C. § 1132(a)(3)(B):

> In the context of the present statute, we think there can be no doubt. Since all relief available for breach of trust could be obtained from a

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[4] *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

[5] *Id.* at 250.

[6] *Id.* at 249-50.

[7] *Id.* at 255 (citing *U.S. v. Burke*, 504 U.S. 229, 238 (1992)).

> court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief not at all. We will not read the statute to render the modifier superfluous. . . . Regarding "equitable" relief in § 502(a)(3) to mean "all relief available for breach of trust at common law" would also require us either to give the term a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between "equitable" and "remedial" relief in the very same section of ERISA. . . . [8]

In the end, the majority held that only traditional equitable remedies such as injunction, mandamus, and restitution, but not money damages, were available to ERISA plaintiffs.[9]

Writing in dissent, Justice White asserted that, since ERISA "abounds with the language and terminology of trust law," the statutory phrase "must be construed against the background of the common law of trusts."[10] Since both courts of equity and law had jurisdiction over a trust beneficiary's claims, the dissent stated that it was appropriate to look to the traditional equitable remedies afforded a trust beneficiary. This, the dissent said, included "a monetary award to make the victims of the

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[8] *Id.* at 257-59.

[9] *Id.* at 260.

[10] *Id.* at 264 (White, J., dissenting) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989)).

breach whole."[11] Even though the dissent disagreed with the majority on whether some form of compensatory award was available under ERISA, it agreed that punitive damages were not available:

> The fact of the matter is that not all forms of relief were available in the common-law courts of equity for a breach of trust. Although the equity courts could award monetary relief to make the victim of a breach of trust whole, extracompensatory forms of relief, such as punitive damages, were not available. As this Court has long recognized, courts of equity would not – absent some express statutory authorization – enforce penalties or award punitive damages. . . . As Justice Kennedy has observed, this limitation on equitable relief applied in the trust context as well, where plaintiffs could recover compensatory monetary relief for a breach of trust, but not punitive or exemplary damages.[12]

Although the *Mertens* majority and dissent differed on the availability of compensatory damages under ERISA, they agreed that punitive damages are not available. Because the Court has already answered the question Ms. Audet asks, the Petition should be denied.

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[11] *Id.* at 266 (White, J., dissenting).

[12] *Id.* at 270 (White, J., dissenting).

II. There is no conflict among the federal circuit courts or with any valid decision of the highest court of a state.

Ms. Audet claims the decision of the Eleventh Circuit conflicts with the decision of this Court in *Ingersoll-Rand*,[13] and the pronouncement of the Supreme Court of Alabama in *Weems*.[14] As to *Ingersoll-Rand*, she is incorrect. And, although the Eleventh Circuit's decision may facially conflict with *Weems*, *Weems* and its Alabama companions are not only isolated in a sea of correctly-decided cases, the *Weems* pronouncement on the ERISA punitive damage issue was either dicta or the court was without jurisdiction to decide the issue.

In *Ingersoll-Rand*, the Court addressed a wrongful discharge suit brought by an ex-employee who claimed his discharge was motivated by his employer's desire to avoid contributing to his pension fund.[15] The ex-employee sought compensatory and punitive damages. The issue before the Court was whether the relief sought by the ex-employee was pre-empted by ERISA. In finding that the suit was pre-empted, the Court noted: "It is clear that the relief requested here is well within the power of federal courts to provide."[16] The United States District Court for the Northern District of Alabama seized upon

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[13] *Id.* at 133.

[14] *Weems v. Jefferson-Pilot Life Ins. Co., Inc.*, 663 So. 2d 905 (Ala. 1995).

[15] *Id.* at 136.

[16] *Id.* at 145.

this sentence as allowing any form of extra-contractual damages:

> In Ingersoll-Rand the Supreme Court has now clearly answered the Eleventh Circuit's prayer by giving it the "green light" to fashion ERISA remedies beyond the mere enforcement of claims for unpaid benefits, even though a federally fashioned remedy may bear a striking similarity to some "preempted" state or common law remedy. According to Ingersoll-Rand, a court, state or federal, in an ERISA case, may, as an ERISA remedy, award extra-contractual, even punitive, damages, that is, if the facts call for such a remedy.[17]

The state courts of Alabama followed this misinterpretation of *Ingersoll-Rand* in a series of cases holding that state and federal courts are authorized to impose extra-contractual and punitive damages in ERISA cases.[18]

Ms. Audet focuses on *Weems* to argue that *Ingersoll-Rand* established that punitive damages are available under ERISA. Prudential's response is threefold. First, the language in *Ingersoll-Rand* speaks of relief, not remedies

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[17] *Blue Cross and Blue Shield of Alabama v. Lewis*, 753 F. Supp. 345, 347 (N.D. Ala. 1990).

[18] *See Ex parte Metropolitan Life Ins. Co.*, 679 So. 2d 686, 688-89 (Ala. 1996); *Weems*, 663 So. 2d at 905; *Haywood v. Russell Corp.*, 584 So. 2d 1291, 1296 (Ala. 1991). One of the *Weems* dissenters later took the incorrect position in *Metropolitan Life* that the Court's denial of certiorari in *Weems* was an indication that punitive damages are available under ERISA, *Metropolitan Life* at 689 (Houston, J. concurring); the denial of a petition for certiorari "imports no expression of opinion upon the merits of the case." *U.S. v. Carver*, 260 U.S. 482, 490 (1923).

such as compensatory and punitive damages. Second, whatever precedential value the language in *Ingersoll-Rand* once had was supplanted by this Court's decision in *Mertens*, which clarifies that compensatory and punitive damages are not available remedies under ERISA. Third, *Weems* does not present a conflict with the decision of the Eleventh Circuit in this case over which this Court should exercise jurisdiction for two reasons.

In *Weems*, plan participants sued an employer and insurer under state law and ERISA. The participants' pleadings showed that their ERISA claim was under § 1132(a)(1)(B), but they also sought compensatory and punitive damages alleging that the employer had allowed their ERISA plan to lapse. One of two analyses of *Weems* must be accurate. Either the *Weems* court had jurisdiction because the only ERISA claim was under § 1132(a)(1)(B), in which case any language regarding the availability of compensatory and punitive damages under 29 U.S.C. § 1132(a)(3) is nothing more than dicta. Or, alternatively, the *Weems* court improperly asserted jurisdiction over a claim under § 1132(a)(3), because exclusive jurisdiction over § 1132(a)(3) claims is vested in federal courts. 29 U.S.C. § 1132(e). In either event, *Weems* is not a "decision" upon which Ms. Audet can validly rely to argue that conflict exists with the Eleventh Circuit's decision here. S.Ct.R. 10(a).

Ms. Audet also claims conflict among the federal circuit courts. The cases upon which she relies, however, all expressly recognize, as did the Eleventh Circuit here,

that punitive damages are not available under ERISA.[19] Again, there is no conflict.

III. Neither *Mertens* nor the decisions of the federal circuit courts conflict with Congressional intent.

To support her argument that the decisions of the federal circuit courts conflict with Congressional intent, Ms. Audet cites a 1988 Report from the House of Representatives Education and Labor Committee.[20] As the Eleventh Circuit recognized in *McRae*, the Report "carries

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[19] *See Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196, 199 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1512 (1998) (recognizing that the Supreme Court has "adamantly ruled that ERISA's express remedies are a signal to courts not to create additional remedies of their own."); *Hemelt v. U.S.*, 122 F.3d 204, 207 (4th Cir. 1997) (holding that ERISA does not allow claims for compensatory or punitive damages); *Zimmerman v. Sloss Equipment, Inc.*, 72 F.3d 822, 828 (10th Cir. 1995) ("We have previously held that punitive damages are not available in an ERISA action."); *Landwehr v. DuPree*, 72 F.3d 726, 735 (9th Cir. 1995) ("ERISA plaintiffs may only obtain equitable relief such as restitution, and not compensatory or punitive damages, from a party in interest."); *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29, 31 (5th Cir.), *cert. denied*, 510 U.S. 816 (1993) ("Had Congress intended to develop ERISA remedies additional to the ones it specifically crafted, it has had ample opportunity to enact such legislation."); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 286 (2d Cir. 1992) (holding that neither § 502(a)(2) nor § 502(a)(3) allows punitive damage awards); *Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir.), *cert. denied*, 506 U.S. 818 (1992) ("We are not rash enough to believe that the [*Ingersoll-Rand*] Court intended to overrule settled law in most of the circuits, as well as narrowly limit – if not overrule – its own decision in *Russell* in such an off-hand manner.").

[20] H.R. Rep. No. 101-247, at 98 (1989).

slight weight in this case."[21] A Committee statement does not express Congressional intent – just the opinion of a Committee nearly 15 years after ERISA was enacted.

As this Court noted in *Mertens*, the "notion that concern about punitive damages motivated Congress is a classic example of projecting current attitudes upon the helpless past."[22] In 1974, when ERISA was enacted, the availability of punitive damages was not an issue. By 1988, when the Committee Report was promulgated, there were "clear precedents" from this Court and the federal circuit courts that punitive damages were not available under ERISA.[23] Faced with such clear precedents, Congress could easily have amended ERISA to clarify that punitive damages were available to ERISA plaintiffs – if that were Congressional intent. That Congress enacted no such amendment in response to the well-developed case law construing ERISA and the 1988 Committee report leaves little doubt that this Court and the federal circuit courts have correctly construed Congressional intent.

IV. Ms. Audet's remaining arguments are for Congress and not this Court.

Ms. Audet's final arguments are correctly directed to her Congressional representatives and not to this Court. If public policy, public outcry, and rampant abuses by

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[21] *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 822-23 (11th Cir. 1991).

[22] *Id.* at 257 n. 7.

[23] *McRae*, 920 F.2d at 823.

ERISA insurers call for response, as she contends, then that response is for Congress to provide. The Seventh Circuit, which authored *Herdrich v. Pegram*,[24] the case upon which Ms. Audet relies for her "consumer outcry" argument, recognized as much.[25] To the extent Ms. Audet claims that the facts of this case support an award of punitive damages, the district court, as the trier of fact, disagreed that Prudential even exhibited a bad motive. Pet. App. 12a.

The only question presented by the Petition is whether punitive damages are available under ERISA as it exists today. This Court has correctly answered the question in *Mertens*. Long before *Marbury v. Madison*,[26] this Court established that it is the province of the judiciary to construe the laws enacted by Congress, but not to determine what the law should be. The Court most recently clarified that division of power in *Mertens*: "We will not attempt to adjust the balance between . . . competing goals that the text adopted by Congress has struck."[27]

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[24] 154 F.3d 362 (7th Cir. 1997).

[25] *Harsch*, 956 F.2d at 660.

[26] 5 U.S. (1 Cranch) 137 (1803).

[27] *Id.* at 263.

CONCLUSION

There is no reason for this Court to exercise its supervisory jurisdiction in this case. The question presented was authoritatively answered in *Mertens*, the federal circuit courts are unified in their rejection of ERISA punitive damage claims, and the few incorrectly-decided Alabama cases are insufficient to trigger conflict jurisdiction. Any further evolution of ERISA is for Congress.

Respectfully submitted,

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